PB SECURITIES SDN BHD

v.

AUTOWAYS HOLDINGS BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: B-02-57-2000]
11 AUGUST 2000

COMPANY LAW: *Arrangements and reconstructions - Restraining order - Whether debt can still be proved by way of a trial despite such order having been obtained - Whether doing so amounts to deceiving court*

COMPANY LAW: *Arrangements and reconstructions - Dispute as to debt - Whether court may deal with such issue summarily - Whether necessary to have trial - Restructuring scheme acknowledging creditor as scheme creditor - Whether there may still be a bona fide dispute as to debt - Whether debt can still be proved by way of a trial despite restraining order having been obtained - Companies Act 1965, s. 176(1) & (10)*

COMPANY LAW: *Arrangements and reconstructions - Proposed restructuring scheme - Whether may be made without prejudice*

COMPANY LAW: *Arrangements and reconstructions - Scheme creditors - Proposed restructuring scheme acknowledging creditor as a scheme creditor - Whether company may subsequently dispute such creditor's claim - Whether company estopped from so doing - Whether doing so amounts to deceiving court since restraining order already obtained*

The appellant had offered a margin facility to a wholly-owned subsidiary of the respondent on the security of a corporate guarantee given by the respondent in favour of the appellant. The respondent and its group of companies were unable to pay their debts and, as a result, a restraining order under s. 176(10) of the Companies Act 1965 ('the Act') was obtained ('the restraining order'). After sending two earlier proposals, a third and final proposal containing a debt restructuring scheme was sent to the appellant. This scheme was unacceptable to the appellant and it intimated its intention to vote against the same at a creditors' meeting convened to endorse the scheme. If the appellant voted against the scheme, the respondent would have failed to secure the requisite 3/4 value of creditors

in order to endorse the scheme. One day before the scheduled meeting, the respondent's board of directors resolved to oppose the appellant's claim and accordingly the appellant was excluded from the scheduled meeting. The appellant applied to the High Court for a declaration that it was a scheme creditor of the respondent and was entitled to attend and vote as an unsecured creditor at the said meeting. The appellant relied on, *inter alia*, the following facts: (i) the restraining order itself listed the appellant as a scheme creditor; (ii) all the proposals containing the restructuring scheme recognised the appellant as a scheme creditor; and (iii) the respondent had requested the appellant to provide information relating to the debt. The learned judge held that there were serious competing views as to whether the appellant was a scheme creditor and that this would depend on whether the appellant's claim by way of proof of debt was recognised and admitted by the respondent. The learned judge further held that there was a *bona fide* dispute as to the debt, which could only be resolved at a trial, based on the fact that the words "without prejudice" appeared on the proposal. The appellant appealed.

Held:
Per Shaik Daud Ismail JCA

[1] The learned judge completely ignored the restraining order restraining the appellant from suing the respondent on the guarantee. Having been thus restrained, the appellant could not be required to prove its claim by way of a trial.

[2] Any reference to a *bona fide* dispute of a debt goes right against the purport of section 176 proceedings. The words "in a summary way" appearing in s. 176(1) and (10) of the Act clearly mean that the sanctioning court acting under that section is entitled to deal with every issue in respect of the scheme of arrangement in a summary way. There is no necessity for a protracted trial of the debt. More so in this particular case where the debt had been repeatedly acknowledged.

[2a] The restructuring scheme itself acknowledged the appellant as a scheme creditor and even invited the appellant to produce certain information confirming the debt. Upon being furnished with such information, no objection was raised by the respondent. Therefore, the question of a *bona fide* dispute did not arise.

[3] There is no such thing as a without-prejudice proposal under s. 176 of the Act. The appearance of the phrase "without prejudice" in the proposal made no difference as it had no effect whatsoever on the proposal.

[4] The respondent could have rejected or questioned the capacity of the appellant from the very beginning and it could even have omitted the appellant from the list as a scheme creditor. This the respondent did not do. Thus, the learned judge ought to have applied the doctrine of estoppel against the respondent. The respondent had led the appellant to harbour a legitimate expectation that it was a scheme creditor and thus it would be unconscionable and unjust for the respondent to assert afterwards that the appellant was not.

[5] The respondent had practised deception on the court. Having earlier obtained the restraining order on the basis of including and asserting in no uncertain terms that the appellant, who was the principal unsecured creditor, was a scheme creditor, the respondent later made an about-turn to exclude the appellant from voting at the unsecured creditors' meeting. The respondent's decision to exclude the appellant, which was only made on the eve of the scheduled creditors' meeting, was made solely to prevent the appellant from voting against the scheme. By obtaining the restraining order preventing the appellant from pursuing its legitimate claim in a court of law, the respondent had abused the process of the court to achieve another purpose. By its act of preventing the appellant from voting at the unsecured creditors' meeting, the respondent had also abused the purport of s. 176 of the Act. To exclude the appellant and to prevent it from exercising its statutory right to vote was not a mere procedural irregularity but an illegality which rendered null and void the votes taken at the said meeting.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah menawarkan kemudahan margin (margin facility) kepada sebuah subsidiari milik penuh responden bersandarkan gerenti korporat yang diberikan oleh responden memihak kepada perayu sebagai jaminan. Responden dan kumpulan syarikat-syarikatnya tidak dapat membayar hutang mereka dan dari itu satu perintah penyekatan dibawah s. 176(10) Akta Syarikat 1965 ('Akta tersebut') telah diperolehi ('perintah penyekatan').

Selepas menghantar dua cadangan yang terdahulu, cadangan ketiga dan yang terakhir yang mengandungi satu skim penyusunan semula hutang telah dihantar kepada perayu. Skim tersebut tidak dapat diterima oleh perayu dan ia menunjukkan niat untuk memberi undi tentangan terhadap skim tersebut di mesyuarat pemiutang-pemiutang yang akan diakan bagi mengindors skim tersebut. Jika perayu mengundi menentang skim tersebut, responden akan gagal mendapat 3/4 nilai pemiutang sebagaimana yang diperlukan bagi mengindors skim tersebut. Satu hari sebelum hari mesyuarat tersebut dijadualkan, lembaga pengarah responden memutuskan untuk menentang tuntutan perayu dan dengan itu perayu telah disingkirkan dari mesyuarat yang dijadualkan. Perayu memohon ke Mahkamah Tinggi untuk satu deklarasi bahawa ia adalah seorang pemiutang skim responden dan berhak untuk menghadiri dan mengundi sebagai seorang pemiutang tak terjamin dalam mesyuarat tersebut. Perayu bergantung, antara lain, kepada fakta-fakta berikut: (i) perintah penyekatan tersebut menyenaraikan perayu sebagai seorang pemiutang skim; (ii) kesemua cadangan-cadangan yang mengandungi skim penyusunan semula mengiktirafkan perayu sebagai seorang pemiutang skim; dan (iii) responden telah meminta perayu untuk memberi maklumat mengenai hutang tersebut. Yang arif hakim memutuskan bahawa terdapat pandangan-pandangan yang sangat bertentangan mengenai samada perayu adalah merupakan seorang pemiutang skim dan ini bergantung kepada samada tuntutan perayu melalui bukti hutang diiktirafkan dan diakui oleh responden. Yang arif hakim juga memutuskan bahawa terdapat satu persoalan yang *bona fide* mengenai hutang tersebut, yang mana hanya akan dapat diputuskan semasa perbicaraan, berdasarkan perkataan "tanpa prasangka" yang tertera pada cadangan tersebut. Perayu merayu.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Yang arif hakim tidak memperdulikan langsung perintah penyekatan yang menyekat perayu dari mendakwa responden atas gerenti tersebut. Memandangkan perayu telah disekat, perayu tidak perlu untuk membuktikan tuntutannya melalui perbicaraan.

[2] Sebarang rujukan kepada persoalan *bona fide* mengenai hutang tersebut adalah bertentangan dengan prosiding dibawah seksyen. 176. Perkataan "secara terus" ("in a summary way") yang tertera di s. 176(1) dan (10) Akta tersebut jelas memberi erti yang mahkamah yang menghukum bertindak di bawah peruntukan tersebut berhak

untuk berurus dengan setiap isu berhubung dengan skim perkiraan secara terus. Bicara yang berlanjutan mengenai hutang tidak perlu diadakan. Lebih-lebih lagi dalam kes ini dimana hutang telah berkali-kali diiktirafkan.

[2a] Skim penyusunan semula sendirinya mengiktirafkan perayu sebagai pemiutang skim dan malahan pula telah menjemput perayu untuk mengemukakan maklumat megesahkan hutang tersebut. Apabila maklumat tersebut diberikan, responden tidak membangkitkan sebarang bantahan. Oleh yang demikan, persoalan mengenai pertelingkahan *bona fide* tidak timbul.

[3] Tidak terdapat sebarang cadangan tanpa prasangka dibawah s. 176 Akta tersebut. Penggunaan ungkapan "tanpa prasangka" dalam cadangan tersebut tidak memberikan sebarang perbezaan memandangkan ia tidak mempunyi sebarang kesan kepada cadangan tersebut.

[4] Responden boleh membantah atau menyoal keupayaan perayu dari awal lagi, malahan ia dapat menyingkirkan perayu dari senarai sebagai seorang pemiutang skim. Responden tidak berbuat apa-apa. Dengan itu, yang arif hakim wajar untuk menggunapakai dokrin estopel terhadap responden. Responden telah memberi anggapan kepada perayu untuk memendam satu jangkaan yang sah bahawa ia merupakan seorang pemitang skim dan dengan itu adalah tidak wajar dan tidak adil bagi responden untuk mengatakan selepas itu yang perayu bukannya sedemikan.

[5] Responden telah membuat satu penipuan terhadap mahkamah. Setelah mendapat perintah penyekatan terdahulunya, atas alasan untuk memasukkan dan mengatakan dengan terma-terma yang jelas bahawa perayu, yang merupakan seorang pemiutang tak terjamin, merupakan pemiutang skim, responden kemudiannya berpaling tadah dan ingin menahan perayu dari mengundi pada mesyuarat pemiutang tak terjamin. Keputusan responden untuk menyingkirkan perayu, yang dibuat hanya pada hari sebelum hari mesyurat pemiutang dijadualkan, telah dibuat dengan tujuan hanya untuk menghalang perayu dari mengundi bertentangkan dengan skim tersebut. Dengan mendapatkan perintah penyekatan menghalang perayu dari meneruskan dakwaannya yang sah di mahkamah, responden telah menyalahguna proses mahkamah untuk mendapat tujuan yang lain. Dengan bertindak

menghalang perayu dari mengundi di mesyuarat pemiutang tak terjamin, responden juga telah menyalahgunakan s. 176 Akta tersebut. Dengan menyingkir perayu dan menghalangnya dari menggunakan hak-hak kanunnya untuk mengundi bukan sahaja satu luar aturan prosedural tetapi satu kepenyalahan undang-undang yang membuat undi yang diambil semasa mesyuarat tersebut, batal dan tak sah.

[*Rayuan dibenarkan*.]

Case(s) referred to:

Amalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd [1981] 3 All ER 577 ***(refd)***

Chor Phaik Har & Ors v. Choong Lye Hock Estates Sdn Bhd & Ors [1996] 4 CLJ 141 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 69(4), 176(1), (3), (10)

Other source(s) referred to:

Estoppel by Representation, Spencer, Bower & Turner, 3rd edn, pp 157-160

Halsbury's Law of England, 4th edn, vol 16, para 1507

For the appellant - Cyrus Das (Benjamin Dawson & Tan Chia Loong with him); M/s Nik Hussain & Partners

For the respondent - William Leong; M/s William Leong

[Appeal from High Court, Shah Alam; Originating Summons No: MT3-24-402-1998]

Reported by S Dharmendran

JUDGMENT

Shaik Daud Ismail JCA:

This was an appeal against the dismissal by the Shah Alam High Court of the appellant's application for a declaration that the appellant was a scheme creditor of the respondent and was entitled to attend and vote as an unsecured creditor at the unsecured creditors' meeting of the respondent.

The appellant, a fully owned subsidiary of Public Bank Bhd, is a licensed stock broking firm. The appellant had by a letter of offer dated 7 October 1997, offered a margin facility of RM50 million to Autoways Development Sdn Bhd, a wholly owned subsidiary of the respondent. A formal agreement

was executed the same day and at the same time too, the respondent, as the parent company of the borrower company, gave a corporate guarantee in favour of the appellant. All these have not been disputed.

By early 1998, it became obvious that the respondent and its group of companies were facing financial difficulties and unable to settle their debts. As a result in May, 1998, they engaged Messrs Arthur Andersen Corporate Advisory Sdn Bhd ("Arthur Andersen") a reputable firm of accountants to prepare a restructuring scheme of arrangements with their numerous creditors for submission to the court under s. 176 of the Companies Act, 1965 ("the Act"). Arthur Andersen came out with a proposal dated 21 May 1998. This proposal recognised the appellant as a scheme creditor, and confirmed by the affidavit of the respondent's managing director one Chua Sin Han, affirmed on 21 May 1998. This fact was also confirmed in an internal document of the respondent as averred to by the managing director of the respondent in the same affidavit at para 9 thereof.

There can be no doubt that these two documents constitute complete acknowledgement that the appellant was a creditor.

The Arthur Andersen proposal dated 21 May 1998 was put forward by the respondent to the court when the respondent applied for an *ex-parte* restraining order under s. 176(10) of the Act on 22 May 1998, where the appellant was listed as one of the scheme creditors. The restraining order was served on the appellant on 26 May 1998. It is submitted that this in itself is an acknowledgement that the appellant was one of the scheme creditors, otherwise there was no reason whatsoever to serve the restraining order on the appellant.

This was followed on 9 June 1998 by the respondent asking the appellant to submit its claims of the debt owing for the purpose of the scheme. This request is contained in a letter dated 9 June 1998, from the respondent's managing director one Chua Sin Han addressed to the appellant. There has been no denial of this. It is submitted that this act of the respondent is an unqualified acknowledgement as the respondent had not reserved the right to reject the appellant's claim nor was the letter written "without prejudice". It is, we think, pertinent to reproduce this letter.

9th June 1998
PB Securities Sdn. Bhd.
22nd Floor, Menara Penglobal
No. 8, Lorong P. Ramlee
50250 Kuala Lumpur.

Dear Sirs,
Re: Outstanding Amount due:
1) Autoways Construction Sdn. Bhd.
2) Autoways Holdings Berhad

Shah Alam High Court Order No. MT3-24-402-1998

We refer to the Restraining Order under Section 176(10) of the Companies Act 1965 given by the High Court dated 22nd May 1998.

You are now required to forward a "Statement of Claims: of the debt due to you as at 31st May 1998 in order to assist our Financial Advisers and Corporate Lawyers to work out all actual and contingent liabilities so as to complete the scheme of arrangement and compromise.

We wish to inform that if you fail to submit the said "Statement of Claims as 31st May 1998" by the 30th June 1998, you may not be considered in our scheme of arrangement and compromise restructuring exercise because of the time constraint we have to determine the total extent of the liabilities.

Therefore, we urge you to reply to us as soon as posible to enable us to finalise the scheme. If you have any queries, please do not hesitate to contact our Ms. Melissa or Ms. Jackie.

Your prompt action to the above is much appreciated.

Yours faithfully,
AUTOWAYS CONSTRUCTION SDN. BHD.

(this is a computer generated print out, no signature required)

CHUA SIN HAN
Managing Director.

The contents of this letter speak for itself

Accordingly and in response to the request, the appellant submitted its claim by hand *vide* covering letter dated 26 June 1998, claiming RM50,596,678.07. This was received and acknowledged by the respondent's Credit Manager one Nooraini Ashaari. There was no rejection of this claim nor was there any other response.

On 15 September 1998, the appellant sued the principal borrower Autoways Development Sdn Bhd for RM51,681,264.14 and interest.

The respondent failed to submit a scheme to the creditors within the requisite six months as ordered by the restraining order. On 19 October 1998 they applied *ex parte* for an extension of the restraining order for another six months and this was granted on 19 November 1998. Consequently on 7 December 1998, for the very first time the respondent submitted a restructure proposal to the appellant for its consideration. This was the first proposal. It is submitted that this is yet an unqualified acknowledgement of the appellant as a scheme creditor. A further acknowledgement can be seen from a letter dated 2 March 1999 from the respondent to the appellant, acknowledging a meeting between the appellant and the respondent's consultants of 9 February, 1999 and requesting the appellant's assistance to provide information on the following:

(1) the principal and interest amount outstanding as at 31 December 1997;

(2) a breakdown of monthly interest and other charges from 1 January 1998 to 31 December 1998;

(3) confirmation on the shares of collateral, amount and value sold since 31 December, 1997.

By another letter dated 21 April 1999 to the appellant, the respondent confirmed another meeting between their consultant and the appellant where the scheme was discussed.

Then by a letter dated 5 May 1999, the respondent's solicitors submitted an amended restructuring scheme to the appellant's solicitors, "for your client's consideration in settlement of the above matter". This was the second proposal. In this proposal the appellant was again listed as a creditor.

By a court order obtained by the respondent *ex parte* on 19 May 1999, the respondent was allowed to call separate meetings of separate classes of creditors for approval of the re-structuring scheme, and at the same time obtained a further six months extension of the court order dated 19 November 1999. On 8 September 1999, a third and final proposal was sent to the appellant, by which act it is construed as an invitation to the appellant to attend and vote at the creditors' meeting as a scheme creditor.

The fact that the final proposal was sent to the appellant has not been denied and this is adverted to in the affidavit of one Yong Yoong Fa, the chief operating officer of the appellant, affirmed on 13 October 1999.

The final proposal carried a definition of an unsecured creditor as:

> The class of creditors which include stock broking firms which have provided margin financing to ADSB and financial institutions who have extended credit facilities to ACSB against corporate guarantees of AHB.

It cannot be gainsaid that, the above definition fits the appellant to a T. The meeting for the unsecured creditors was to be held at 10am on 30 September 1999. The total amount of the debt was RM112,026,000 and this included the RM50,597,000 due to the appellant. Based on this notice of meeting a proxy form dated 27 September 1999, was filed in which the appellant indicated its desire to vote against the scheme. Such negative vote would be fatal to the respondent as the respondent would not be able to secure the requisite 3/4 value of creditors in order to endorse the scheme. The appellant represented 45.2% of the total value of unsecured debt of RM112,026,000. Upon receipt of the proxy form, the respondent's solicitors contacted the appellant's solicitors to seek a postponement of the scheduled meeting with a view of exploring whether the appellant had any proposal for a better offer. This is reflected in the Yong Yoong Fa's affidavit referred to earlier. The appellant refused a postponement and the next day, the day of the scheduled meeting, the appellant's proxy representative was excluded from the meeting. It would appear that one day before the scheduled meeting of the unsecured creditors, on 29 September 1999, the respondent board of directors held an emergency meeting whereby they resolved to oppose the claims specifically by the appellant and one other creditor. This decision came after the respondent received the proxy document indicating the appellant's intention to vote against the restructuring scheme. Accordingly on 30 September 1999 the appellant was excluded from the scheduled meeting as well as the adjourned meeting on 10 November 1999.

From the facts adumbrated above, it seems obvious that from the beginning the respondent agreed and accepted the appellant as one of their unsecured scheme creditors but the moment they realised that the appellant intended to vote against the scheme, the respondent made an about turn and rejected the appellant as an unsecured creditor.

As a result of this, on 13 October 1999 the appellant applied in the Shah Alam High Court to intervene in the proceedings for the approval of the scheme. On 10 November 1999, however, the various other meetings of the various classes of creditors proceeded as scheduled and the respondent claimed to have obtained the requisite 3/4 majority, approving the restructuring scheme. Based on this premise, the respondent purported to apply to the High Court for the formal approval of the scheme under s. 176(3) of the Act.

Based on the final proposal, there was justification for the appellant to vote against the scheme. If the scheme was sanctioned by the court, unsecured creditors like the appellant, would have to give up 55% of their debt, as well as all interests due and in return would be left with a mere 45% of the debt whilst in turn would be settled by the issue of redeemable convertible preference shares in the respondent. This to our mind would be most unfair on the appellant who would have to voluntarily give up 55% of the debt and compulsorily take up 45% of shares in the respondent. To make matters worse, after that, a permanent moratorium is imposed on all legal proceedings in respect of the debt. In other words the appellant is compulsorily asked to compromise 45% of the debt in shares in the respondent, which may not be worth 45% of the debt.

The respondent raised no objection to the appellant intervening but at the hearing of the prayers in the application the appellant, elected to proceed only on one prayer, namely whether it was a scheme creditor and whether the restraining order issued by the court on 25 May 1998, ought to be discharged. Both parties agree that these two issues would decide the outcome of the scheme.

The learned High Court judge whilst allowing the appellant to intervene, held that there were serious competing views as to whether the appellant is a scheme creditor and this, he held, would depend on whether the appellant's claim by way of proof of debt, was recognised and admitted by the respondent. This he held, being a serious *bona fide* issue could only be resolved by way of a full trial. The learned judge completely ignored the order issued by the court dated 25 May 1998, restraining the appellant from suing the respondent on the guarantee. Therefore, having been thus restrained, how could the appellant be required to prove its claim by way of a trial?

The learned judge also made reference to a so called *bona fide* dispute of the debt which could only be resolved at a trial. We find that this reference goes smack against the purport of s. 176 proceedings. The learned judge appeared to have loss sight of the words "in a summary way" appearing

in sub-s. (1) and (10). This phrase must clearly mean that the sanctioning court acting under that section is entitled to deal with every issue in respect of the scheme of arrangement in a summary way. There is no necessity for a protracted trial of the debt. More so in this particular case where the debt has been repeatedly acknowledged without there being any dispute to it. These repeated acknowledgements, as can be seen from the facts stated above are contained in contemporaneous correspondences as well as in the respondent's internal documents. It must not be forgotten that the restructuring scheme itself acknowledged the appellant as a scheme creditor and even invited the appellant to produce certain confirmations of the debt. After being furnished with such information, no objection was raised by the respondent. Therefore the question of a *bona fide* dispute does not arise. The learned judge also ignored the evidence that when the respondent applied for the restraining order, they listed the appellant as one of 24 scheme creditors, to be involved in the restructure exercise. This document was submitted to the court and formed part of the court order. Therefore in the light of what we have stated we agree with the submission of learned counsel for the appellant that, the learned judge was clearly wrong in his reasoning when he held that there ought to be a trial of the debt. The learned judge also appeared to have been influenced by the phrase, "without prejudice" which appeared in the proposal itself. With respect, we are of the view that there is no such thing as a without prejudice proposal under s. 176. There is no such thing as a restricted proposal. Therefore we hold that the appearance of that phrase in the proposal makes no difference, as it has no effect whatsoever on the proposal. It would have been quite simple for the respondent to reject or to question the capacity of the appellant from the very beginning and it was even entitled to omit the appellant from the list as a scheme creditor. Then it may well be justified for the appellant to be excluded from the scheme. This the respondent did not do.

We are of the view that in the light of the uncontradicted evidence of repeated acknowledgements of the appellant as a scheme creditor, the learned judge ought to have applied the doctrine of estoppel against the respondent. Up to 20 September 1999, the respondent had, by their words and conduct, allowed and even to a certain extent, encouraged the appellant to proceed on the basis and understanding that the respondent had accepted the appellant as a scheme creditor. The respondent had, therefore, led the appellant to harbour a legitimate expectation that it was a scheme creditor, and it would be unconscionable and unjust for the respondent to assert afterwards that the appellant was not. In other words, the respondent ought not to be allowed to approbate and reprobate. We refer to *Halsbury's Law of England* (4th edn) vol 16 para 1507:

> 1507. Approbation and reprobation. On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais. The principle that a person may not approbate and reprobate expresses two propositions, (1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

In *Amalgamated Investment & Property Co Ltd (in liq) v. Texas Commerce International Bank Ltd* [1981] 3 All ER 577, the court approved the following passage from Spencer Bower and Turner on *Estoppel by Representation* (3rd edn. 1977 pp. 157-160):

> This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed.

The writer described such an estoppel as an estoppel by convention.

See also *Chor Phaik Har & Ors v. Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 4 CLJ 141. We are of the view that in the present case there were sufficient material before the learned judge for him to hold that it would be unconscionable and unjust to allow the respondent to resile from their course of conduct and by such conduct is estopped from denying that the appellant is an unsecured creditor.

It is also our view that the respondent had practised a deception on the court. Having earlier obtained the restraining order on the basis of including and asserting in no uncertain terms that the appellant who was the principal unsecured creditor, was a scheme creditor, the respondent later made an about turn to exclude the appellant from voting at the unsecured creditor's meeting. From the outset, *ie*, the date of obtaining the restraining order, the respondent already had in their possession all the facts of appellant's status as a scheme creditor therefore there was no earthly reason for them to make this about turn. From the evidence available it seems clear to us that the respondent's decision to exclude the appellant, which was only made on 29 September 1999 *ie*, on the eve of the scheduled creditors' meeting, was solely made to prevent the appellant from voting against the

scheme. By obtaining the restraining order preventing the appellant from pursuing its legitimate claim in a court of law, the respondent had abused the process of the court to achieve another purpose. By their act to prevent the appellant from the unsecured creditors' meeting, the respondent had also abused the purport of s. 176 of the Act. In the circumstances of the case, it is our view that to exclude the appellant and to prevent it from exercising its statutory right to vote were not mere procedural irregularities but illegalities so as to render null and void the votes taken at the adjourned unsecured creditors' meeting of 10 November 1999.

On behalf of the respondent it was submitted that on the totality of the facts of the case, it would be unconscionable for the appellant to succeed and that the doctrine of estoppel does not apply. It was contended that the appellant was guilty of fraud and that there was a conspiracy. It was submitted that the principal borrower, Autoways Development Sdn Bhd was at all material times not the recipient of the facility provided by the appellant. With respect, we find it difficult to accept such a contention. As stated earlier, at the very outset *ie* at the time they obtained the restraining order, the respondent was already in possession of all the facts of the appellant's status and yet the respondent elected to include the appellant as a scheme creditor, therefore, the respondent ought not to be allowed to cry conspiracy and fraud at this late stage, a fortiori when they knew that the appellant was going to vote against the scheme. Therefore, we find no merits in the respondent's submission of conspiracy and fraud at this stage of the proceedings.

In the light of the above, we allowed the appeal with costs here and below and ordered the refund of the deposit to the appellant. At this stage learned counsel for the respondent informed the court that in view of the expenses involved, the respondent would not be holding a fresh meeting of unsecured creditors and were prepared to accept that the appellant had voted against the scheme and the consequence of which is that the restructuring scheme would not be carried out. By consent of both parties, we also made a consequential order to the effect that acting under s. 69(4) of the Act, we declared the creditors' meeting for unsecured creditors under scheme A held on 10 November 1999 to be invalid.